No. 20071

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

BAKER & TAYLOR DRILLING CO.,

Appellant,

vs.

R. W. STAFFORD, Trustee,

Appellee.

APPELLANT'S REPLY BRIEF.

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Appellee.

APPELLANT'S REPLY BRIEF.

Statement Re Order of District Court Referring Proceeding to Referee and Special Master.

Appellee's brief states that appellee does not find in the Record the Order of the Judge of September 4, 1963, referring the proceeding involved to Ronald Walker as Referee and Special Master. While copy of the Record, as originally prepared, to which appellant had access, did not reflect that Order, the Record was subsequently supplemented and that Order is in the Record at page 296 of the Transcript of Record. Appellant joins appellee in referring to that Order and joins appellee in stating that by Order of September 4, 1963, the United States District Court for the Southern District of California, Central Division, through Judge W. C. Mathis, District Judge, appointed Ronald Walker as Referee and Special Master.

Appellant takes issue with the second grammatical paragraph, page 3 of appellee's brief, and with the Record reference by appellee referred to as supporting that statement.

Statement of Appellant Taking Issue With Appellee as to Factual Matters.

Appellant takes issue with the last grammatical paragraph, page 3 of appellee's brief, and with the Record reference by appellee refered to as supporting that statement.

Appellant takes issue with the last grammatical paragraph, page 3 continuing on to page 4 of appellee's brief, and the record reference as referred to in support of that paragraph. Appellant further takes issue with appellee's interpretation in that paragraph of what appellee states briefly to be the agreement between J. D. Amend and the debtor corporation. If it be appellee's interpretation of the letter of February 11, 1963, to H. F. Schlittler, the letter certainly does not support or justify such an interpretation. Appellee refers to that letter as record reference for the agreement. The letter does not purport to be an agreement or even a proposal to the debtor corporation, and in any event makes no reference to $60,000.00. The letter is set out in full as Appendix Exhibit 7 to appellant's brief. The letter appears as Exhibit 3 to Amend's Deposition and was introduced and received in evidence. [Tr. p. 3, March 24 hearing.]

Appellant takes issue with appellee's statement in the last paragraph on page 4 of his brief that the drilling costs of the well on Section 56 were paid and advanced by the debtor corporation as being unsupported by the

Record. Baker & Taylor Exhibit "C" reflects a check of Baker & Taylor Drilling Co. for $9,000.00 signed "J. D. Amend Escrow Account, payment on Section 56." At page 38 of the Transcript of March 24 hearing J. D. Amend testified that the check was his check. Amend further testified at page 39 of the Transcript that the checks, other than the $11,000.00 check which went to pay for the well on Section 56, were checks by him.

Appellant takes issue with appellee's statement on pae 5 of appellee's brief that "on August 24, 1962, and pursuant to oral agreement between J. D. Amend and the debtor corporation" the debtor corporation at this time entered into a contract for the drilling of an oil and gas well with Baker & Taylor Drilling Co. upon Section 54. We do not take issue with, but declare that Tri-State Petroleum, Inc. did on August 24, 1962, enter into a contract with Baker & Taylor Drilling Co. for the drilling of a well on Section 54, but challenge the statement that it was pursuant to the original agreement between J. D. Amend and the debtor corporation. Appellee makes record reference to page 10, line 16, of the March 24 hearing. The Record at that place does not support the statement and we do not find in the Record at any place evidence to support the statement.

While probably only a typographical error, appellee at page 7 states that the well on Section 2 was to be drilled "to a depth of 5400 feet from the surface." 800 feet was the depth specified in the contract and not 5400 feet. [See Contract, Defendant's Exhibit 1, Amend Deposition.]

At page 7 of appellee's brief appellee states that the contract for the drilling of the well on Section 2 provided that the sum shall be "payable in 30 days" after completion of the drilling of the well. The contract provides for payment "within Thirty (30) days." [See Contract, Defendant's Exhibit 1, Amend Deposition.]

Appellee's statement with respect to the three $20,000.00 checks, the application of which is here involved, is completely misleading, completely disregards the dates of receipt by Baker & Taylor Drilling Co. of the checks and disregards the fact that the checks were not received by appellant in date order. The check dated December 15 is identified and frequently referred to as Check No. 142. That check is the $20,000.00 check which was received by Baker & Taylor Drilling Co. from J. D. Amend, receipted for him but receipted as of date December 19, 1962, and was deposited by appellant on December 20, 1962. The receipt is Deposition Exhibit 12 to Amend Deposition. See also Baker & Taylor Exhibit "L" which is Appendix Exhibit 6 to appellant's brief.

While J. D. Amend never testified positively that December 19, 1962, the date of receipt by him, was the exact date on which he delivered Check No. 142 to Baker & Taylor Drilling Co., he testified that that was the approximate date:

> "Q. Now, Mr. Amend, do you know or could you determine the date at which you delivered to Baker & Taylor the check No. 00142? A. Wasn't there an exhibit that had that date on the—
>
> Q. There is a receipt, deposition Exhibit No. 12, which— A. Well, that would be the approximate date of it.

Q. December 19, 1962? A. Yes.

Mr. Utley: That delivery was what date?

Mr. Berry: December 19, 1962." [Tr. p. 53, March 24-25 hearing.]

Check No. 142 was the only check delivered to Baker & Taylor by Amend. The receipt which Amend received and accepted was dated December 19, 1962, and states "Received of J. D. Amend this 19th day of December, 1962." [See Receipt in full Appendix Exhibit 12 of appellant's brief.]

It is uncontrovertibly established that Check No. 127 in the amount of $20,000.00, dated December 17, 1962, was received, deposited and credited to the Tri-State account on account of the Nusbaum Well, on December 13, 1962. [See Baker & Taylor Exhibit K which is Appendix Exhibit 5 to appellant's brief.] It was not paid by the drawee bank until December 18, 1962. [Tr. p. 18, March 24 hearing; Tr. pp. 18, 11, 112, and the check itself, Trustee's Exhibit 7.] The check was drawn on the Greenfield State Bank of Bakersfield, California, and was deposited in The First National Bank of Amarillo, Texas. [Baker & Taylor Exhibit E, Tr. p. 13, March 24 hearing.] The entire Record reflects that the time at which J. D. Amend claims to have had his conversation with Roy Bulls, in which he claims that he told Bulls that Tri-State Petroleum, Inc. had agreed to pay the drilling costs for the well on Section 2, and claims he told Bulls at the time that he did not want to carry a further interest in the well and that Bulls then and there told Amend that he would notify him as to whether or not his company received further payment, *occurred* at the time the one and only check delivered by Amend to appellant was delivered.

Appellee in his brief at page 9 states that notwithstanding the conversation between J. D. Amend and Roy Bulls and Mr. Bull's telephone call back to Amend that the drilling costs on the well had been paid, Baker & Taylor Drilling Co. proceeded to apply all of the check dated December 17, 1962, to the balance due and payable by Tri-State Petroleum, Inc. for the drilling of the well on Section 54. Such statement and position by appellee is incorrect and grossly misleading because it is uncontrovertible that the check of December 17, 1962, was credited before the conversation between Amend and Bulls, whatever it was, took place, and before any telephone calls from Bulls to Amend, whatever they were, occurred.

Appellant takes issue with the statement in appellee's brief that dispute arises over the fact that it (appellant) applied funds mailed to it for payment of the drilling costs on Section 2 to the balance due it by Tri-State Petroleum, Inc. for drilling work on Section 54. H. F. Schlittler was the only man connected with Tri-State Petroleum, Inc. who testified at the hearings, and his testimony is:

> "Q. Mr. Schlittler, you said the obligation for drilling the Section 2 well was Tri-State's obligation. I take it by that you mean it was Tri-State's obligation to J. D. Amend? A. In agreement with Mr. Amend, that is right.
>
> Q. And it had nothing to do with the obligation as between J. D. Amend and Baker & Taylor Drilling Company? A. Well, no. As far as I am concerned, no." [Tr. p. 167, March 24-25 hearing.]
>
> * * * * *

"Q. You never directed anything to Baker & Taylor Drilling Company with respect to the application of payments, I take it? A. No, sir." [Tr. pp. 167-168, March 24-25 hearing.]

Appellee states in his brief that Bulls, Secretary of Baker & Taylor, was informed by J. D. Amend that Tri-State had promised to send this money (referring to the $20,000.00 check) for this particular purpose and requested that he be informed when it arrived and Mr. Bulls did inform Mr. Amend that it had been received. This statement is challenged as not being supported by the Record. A reading of appellee's brief in the first grammatical paragraph ending on page 14 thereof might lead one to conclude that appellee is referring to Amend's testimony as set out in appellant's Exhibit 10 as supporting such statement. Such Exhibit 10 does not support such statement.

At page 14 of appellee's brief is, the possible misleading, statement that the three $20,000.00 checks were identified or mailed for the purpose of application on the Amend debt owing to appellant. Mr. Schlittler did not so testify and neither did anyone else so testify. Only check No. 142 had any designation of how it was to be applied. The Record is replete of testimony that the other two checks had no designation for application and that nobody designated their application. Schlittler testified that he did not have anything to do with the mailing of the checks. [Tr. p. 163, March 24 hearing.]

Appellant challenges appellee's statement that Mr. Bulls of Baker & Taylor was informed by Amend that the $20,000.00 checks were mailed for the purpose

of application on Amend's debt, and accepted Tri-State as a proper person to pay the obligation of J. D. Amend. Such is not supported by the Record. Neither the testimony of Bulls nor Amend supports such a statement.

While appellee states at page 13 of his brief that Baker & Taylor is nothing more than lien claimant against property admittedly owned by the debtor and J. D. Amend is, of course, incorrect. Appellant does not admit that any property is owned by the debtor. Aside from that erroneous statement, however, such statement by appellee completely disregards the fact that Baker & Taylor Drilling Co. holds and asserts a contractual personal debt liability of J. D. Amend which the Special Master sought to enjoin it from enforcing.

While appellee chooses to designate the relationship of J. D. Amend and Tri-State Petroleum, Inc. with respect to the property involved as joint venturers, no part of the Record in this case justifies or supports any such relationship. The letter from Amend to Schlittler, which Amend and Schlittler say represents their understanding, does not justify such a conclusion. The letter simply evidences an agreement to make an assignment of ¾ interest in the well in question upon various conditions, which were never performed.

Had such assignment been made, the relationship would have been that of cotenants. (See 42 Tex. Jur. 2d, Sec. 20, pp. 51-53.) A copy of the text is included herein as Exhibit 1 for ready reference. See also discussion notes 4 Oil and Gas Reporter 892 (1955).

In Re Lack of Jurisdiction by Bankruptcy Court and Special Master.

While the Transcript of evidence does not reflect that the Trustee's report of August 9, 1963, which lists 66% of the leasehold estate and well involved as owned by others than the debtor, was introduced in evidence before the Special Master, same is nevertheless a part of the Record in the proceeding. Same is nevertheless a part of the Record before this Court and is reflected at pages 25 to 90 of the Transcript of Record. The listing of the interests is reflected at page 51, Transcript of Record. Without becoming involved in protracted argument as to the effect of that report or the effect of *Woods v. Deck,* 112 F. 2d 739 (cited by appellee), it is certainly unquestioned and is uncontrovertible that J. D. Amend owned and owns, at least, a 25% undivided interest of the lease and the well in question, which 25% undivided interest was never in any regard committed to the debtor. The debtor had and has no rights, claim or interest thereto and never asserted any claim, interest or right thereto.

While it is recognized that the Special Master purported to find, in Finding of Fact No. II, that among the properties in which the debtor corporation has an interest are the well and lease in question [Tr. p. 167], the Special Master never purported to find or determine what that interest is. Among the various other reasons for lack of jurisdiction of the subject matter by the Special Master and the Court below one completely unanswerable is that there is at least and in any event a 25% undivided interest in the property which belonged and belongs to J. D. Amend, which 25% undivided interest the Trustee or the bankrupt

never had any right or claim and never asserted any right or claim. There is also involved the personal obligation of J. D. Amend to Baker & Taylor as established by the contract and as established by the testimony of J. D. Amend. [Tr. p. 14, lines 1-20, March 24 hearing.] Nevertheless the Special Master, and ultimately the District Court through approval of the Special Master's Order, purports to assume jurisdiction of the entire property and purports to enjoin and restrain Baker & Taylor Drilling Co. "from hereafter filing, prosecuting or taking any action in any court of any jurisdiction, other than before this court, against *J. D. Amend* or Tri-State Petroleum, Inc. or the Trustee in Bankruptcy of Tri-State Petroleum, Inc., debtor, based upon its claim growing out of the drilling of the gas well mentioned and described in these proceedings."

Appellant earnestly urges all the aspects of lack of jurisdiction of the Bankruptcy court and the Special Master as presented in its Specifications of Error and the authorities as presented in its opening brief, and that the Bankruptcy Court and the Special Master were wholly without jurisdiction of the subject matter with respect to which they sought to act and of the person and rights of appellant. Appellant further earnestly urges that under no conceivable theory or reasoning could the Bankruptcy Court or the Special Master have any jurisdiction of the 25% undivided interest of J. D. Amend in the lease and well in question or of the personal rights and liabilities between J. D. Amend and appellant. Appellee cites no statutes so providing or authority so holding. Appellant submits that no such jurisdiction existed or exists. The Special Master and Bankruptcy Court in these regards,

in any event, have purported to act beyond any conceivable jurisdiction or authority and have so purported to dispose of substantial rights of appellant.

Appellee urges and has urged that the Bankruptcy Court had summary jurisdiction because it urges that J. D. Amend had consented to the summary jurisdiction.

While it is recognized that J. D. Amend probably submitted his person to the jurisdiction of the Bankruptcy Court, try as one may to find such, he never in any regard submitted or purported to submit his uncontrovertibly owned 25% undivided interest of the property involved to the jurisdiction of the court. In law and in fact he could not do so. As is said in Collier on Bankruptcy, 14th Ed., Vol. 6, Sec. 305, p. 576, and *In re Prima Co.*, 98 F. 2d 952 (7th Cir. 1938) courts of bankruptcy possess only such jurisdiction and powers as are expressly or impliedly conferred on them by Congress. To say that J. D. Amend could submit his property to the jurisdiction of the bankruptcy court and thereby confer on the Bankruptcy court jurisdiction as to Baker & Taylor Drilling Co. with respect to such property and jurisdiction of Baker & Taylor Drilling Co. as to personal obligations and rights as between Baker & Taylor Drilling Co. and J. D. Amend is completely beyond the pale of any authority. Bankruptcy courts have jurisdiction to administer only property of bankrupts and have no jurisdiction to administer property of third parties or to grant protection to third parties.

Appellee's position and argument completely disregards the United States Supreme Court decisions in *Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U.S. 426,

68 L. Ed. 770, and *Cline v. Kaplan,* 323 U.S. 97, 89 L. Ed. 99 (1954), as well as the other cases cited in appellant's brief under argument with respect to lack of jurisdiction of the subject matter of the person of Baker & Taylor Drilling Co. In *Cline v. Kaplan* the Supreme Court stated with respect to such matters:

> "Once it is established that the claim is not colorable nor frivolous, the claimant has the right to have the merits of his claim passed on in a plenary suit and not summarily."

Viewing the uncontrovertible facts as presented by the Record and as set out under Statement of Facts in appellant's brief, and even considering appellee's brief, it cannot reasonably be concluded that Baker & Taylor's claim is frivolous or colorable only.

Appellee's argument under "Exclusive Jurisdiction of the Debtor and its Property Wherever Located" and the authorities therein cited in no regard meet the situation here involved. The Special Master, with ultimate approval of the District Court, has not merely sought to deal with property of the bankrupt and to pass upon the amount of validity of claims against the bankrupt, but has sought summarily to adjudicate an interest or title into the bankrupt as against a bona fide substantial and strong claim of Baker & Taylor Drilling Co. that no such title exists, and has sought to exercise a jurisdiction with respect to property in which unquestionably and uncontrovertibly the bankrupt has no interest or title and has sought to adjudicate rights and liabilities between Baker & Taylor Drilling Co. and J. D. Amend as to personal liabilities and obligations between them and has enjoined the pursuit of

those rights of Baker & Taylor Drilling Co. against J. D. Amend.

Appellee and the Special Master have wholly failed to make the inescapable distinction that Amend owned a property right and interest in which the creditor uncontrovertibly had no right, title or interest and that Amend had a personal and individual obligation and liability to Baker & Taylor Drilling Co. under his contract which in no manner or regard affected or could affect the bankrupt creditor.

At the time of the contract between Baker & Taylor Drilling Co. and Amend the bankrupt creditor was not remotely involved. The debt to Baker & Taylor Drilling Co. by J. D. Amend is a matter between Amend and Baker & Taylor. Appellee's statement that the entire transaction out of which Baker & Taylor's claimed indebtedness arose was a three-party transaction in which Tri-State was a party is wholly and completely unsupported by the Record. The Record establishes the opposite.

The argument by appellee that the filing of a lien by Baker & Taylor Drilling Co. changed the situation so as to subject Baker & Taylor to the jurisdiction of the court is wholly fallacious, such argument simply assumes jurisdiction to exist. Appellee's argument that it is necessary to protect J. D. Amend from his personal contract obligations and suits to enforce same and to protect his property in order to protect the bankrupt creditor is erroneous in fact and in law.

The argument of the Trustee that a proceeding by appellant against J. D. Amend with respect to personal obligations of J. D. Amend to appellant would so affect the bankrupt creditors' rights as to vest the Bankruptcy

Court with jurisdiction to enjoin such action has been repudiated in *In re Magnus Harmonica Corp.*, 233 F. 2d 803 (3rd Cir. 1956); *In re Magnus Harmonica Corp.*, 237 F. 2d 867 (3rd Cir. 1956); and *In re Diversey Bldg. Corp.*, 86 F. 2d 456 (7th Cir. 1936) (cert. den. in *Diversey Building Corporation v. Weber*, 81 L. Ed. 870, 300 U.S. 662, 57 S. Ct. 492).

The question of whether Amend's interest in the property is subject to a lien of appellant is of no concern to the bankrupt creditor or the Bankruptcy Court. The bankrupt creditor has no right in J. D. Amend's property and whether his interest be subject to lien or not cannot affect the bankrupt creditor or its estate. In any event that the determination of that question is beyond the pale of the Bankruptcy Court is established by authorities cited in appellant's opening brief.

Without receding in any regard from any of its other positions, appellant says that a different situation might have been presented if the Bankruptcy Court had merely held that the bankrupt creditor had or was entitled to a ¾ interest in the property involved and that Baker & Taylor Drilling Co. might not proceed against that ¾ interest, or to pursue a claim against that ¾ interest. Appellant earnestly urges that those questions themselves could not be adjudicated by the Bankruptcy Court, but were required to be determined in a plenary proceeding in a court which could acquire jurisdiction over Baker & Taylor Drilling Co. and the subject matter. In any event, however, the bankruptcy court did not stop at any such point, but proceeded to attempt to completely dispose of appellant's rights with respect to property over which the Bankruptcy Court

could not conceivably have jurisdiction, *i.e.* at least the 25% undivided interest of J. D. Amend, and to dispose of and adjudicate rights as between two third parties and to exercise jurisdiction over rights and parties of which and of whom the Bankruptcy Court had no jurisdiction.

In Re Estoppel.

Appellant, as it has at all times, urges that this case should be disposed of on the grounds of lack of jurisdiction. It nevertheless urges that if the question is reached the lien or debt of appellant is established.

Appellee belabors the question of whether J. D. Amend had the right to direct where the payments of Tri-State should be applied. Appellee also propounds the theory that J. D. Amend at times acted in the capacity of agent for Tri-State. Appellant challenges the existence of proof of any such. Each of such arguments by appellee is wholly academic in that the positive and uncontradicted and uncontrovertible evidence is that J. D. Amend did not at any time direct Baker & Taylor Drilling Co. as to any application of payments. At the expense of being repetitious, we reiterate:

J. D. Amend testified time and again that he did not direct Baker & Taylor Drilling Co. as to any application or as to how any check was to be applied [Amend Deposition 31, 32; Tr. pp. 51, 52, 53, March 24-25 hearing; Tr. p. 108, July 1-2 hearing.]

J. D. Amend testified that he had no instruction from Tri-State as to application of payments [Amend Deposition 29.]

H. F. Schlittler, President of Tri-State Petroleum, Inc., testified with respect to the issuances of the three $20,000.00 checks and was the only person connected

with Tri-State who testified, testified that he did not direct anything to Baker & Taylor Drilling Co. with respect to application of payments [R. pp. 167, 168; Tr., March 24 hearing.]

Certainly the testimony of Amend, Schlittler, Bowie and Bulls all negative any direction to appellant as to application of the two checks in question. The Special Master did not find that there was any direction to Baker & Taylor Drilling Co. as to application of payments. Appellee falls back on estoppel of Baker & Taylor Drilling Co. Appellee's position as to what Baker & Taylor Drilling Co. is estopped from has always been quite nebulous and is left so in appellee's brief. Search as one may through all the testimony and all the Record, there is no semblance of evidence that Bulls or anyone else informed Amend, Tri-State or anyone else as to anything more than that a certain sum of money, *i.e.* a third check from Tri-State Petroleum, Inc. in the sum of $20,000.00, or a total of $60,000.00, had been received.

The Special Master by his Finding of Fact VIII found that Baker & Taylor Drilling Co. is estopped from asserting a claim against J. D. Amend or Tri-State Petroleum, Inc., or from asserting a lien against the gas well or leasehold interest on Section 2, above described, in any sum whatsoever; and that the leasehold interests in gas well on Section 2 are free from any interest or claims of appellant in any sum whatsoever. By the Special Master's Conclusion of Law III he concludes that the claim and defense of estoppel asserted by the Trustee and J. D. Amend against the claim of Baker & Taylor Drilling Co. are true and sufficient to "sustain the plea of estoppel" and does

estop Baker & Taylor Drilling Co. from applying the funds received by Baker & Taylor Drilling Co. in December, 1962, upon the balance due it from Tri-State Petroleum, Inc. for the drilling of a well on Section 54, known as the Nusbaum Well. Any finding or conclusion by the Special Master that Baker & Taylor Drilling Co. was informed and knew that the two $20,000.00 checks in question were mailed by Tri-State for the purpose of paying the drilling costs on the Wilbanks well is completely contrary to the testimony of Amend and Schlittler. It is to the testimony of those two only that the Special Master could look for support of any such finding or conclusion. Such finding or conclusion is clearly wrong, and is not within the permissible range of any evidence.

It is respectfully submitted and earnestly urged that there was no direction as to application of payment, there was no representation by Baker & Taylor Drilling Co. as to any manner or mode of payment, and that by whatever rule of estoppel this case is to be measured, indispensable elements of estoppel are absent.

There is wholly absent any false representation or concealment of any fact by appellant.

Under the Texas rule, as to essential elements of estoppel, an essential element is that the party relying on estoppel or to whom the false representation was made must have relied on or acted on it *to his prejudice.* Under the California rule, as stated by appellee, an essential element is that the person claiming estoppel must rely on the conduct *to his injury.*

The person claiming estoppel must have done or omitted some act or changed his position in reliance on the representation and conduct of the other party. Such follows from the elements of estoppel as contained

in the authorities in appellee's brief as well as appellant's brief.

See *State of Oklahoma v. State of Texas,* 45 S. Ct. 497, 268 U.S. 252, 69 L. Ed. 937; 31 C.J.S., Sec. 72, p. 442; 22 *Tex. Jur.* 2d, Sec. 16, p. 683; and *Nance v. Currey,* 257 S.W. 2d 847 (C.C.A.). Excerpts from such authorities are included as Appendix Exhibit 2.

By whichever rule the question of estoppel is measured, that necessary element of reliance or action to injury or prejudice is completely absent. There is no evidence whatsoever and no finding by the Special Master that either Amend or the bankrupt debtor did or refrained from doing any act, nor relied on any act of Baker & Taylor to their injury or prejudice.

Any contention of estoppel is simply a contention that Trustee and Amend now have the right to have reversed the application made by Baker & Taylor Drilling Co. to Tri-State's account of Tri-State's funds received by Baker & Taylor Drilling Co. from Tri-State without direction as to application, which application was made at the time of receipt, and now have such funds credited to the account of J. D. Amend. The facts simply do not raise an estoppel which does or can effect any such gymnastics. The law simply does not permit such. See authorities cited in appellant's brief.

Wherefore, appellant prays as in its opening brief.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion the foregoing brief is in full compliance with those rules.

David M. Garland.

APPENDIX EXHIBIT 1.

42 Tex Jur 2d Oil and Gas § 20

§20. *Divided interest; Cotenancy.*

The bundle of interests that constitutes ownership of a parcel of land or of the minerals therein may be divided in a number of ways. To mention only a few, two or more persons may own interests in land in a form of concurrent ownership; ownership may be divided among the owners of present possessory interests such as estate for years, life estate, or fee simple defeasible, and the owners of future interests such as remainders, reversions, or possibilities of reverter; legal ownership may be in a trustee and equitable ownership divided among owners of present and owners of future interests; ownership may be subject to restrictions imposed by reason of the minority or incapacity of the owner, or may be subject to a variety of security interests or restrictions on the use of the property; or separate parcels of land may by agreement be subject to a plan of development that may give the owner of each individual parcel some interest in the other individual parcels.[6] Thus, the owners of undivided portions of oil and gas rights in and under real estate are tenants in common, and a lessee of such a cotenant becomes a cotenant with the cotenants of his lessor.[7] The relationship between co-lessors under a unitized lease has been described as a joint ownership or joint tenancy in all the royalties reserved in the lease, so that all the lessors are necessary and indispensable parties to an action of trespass to try title to one of the tracts covered by the lease,[8] and production on any tract covered by the unitized lease is regarded for all purposes as produc-

tion from all the tracts, so as to perpetuate beyond the primary term a mineral deed to one tract for a term of years and so long thereafter as oil, gas, or minerals shall be produced, though no production has been obtained from that particular tract.[9] This relationship has also been described in terms of mutual conveyances by the co-lessors of undivided interests in the minerals under their respective tracts.[10] Again, a tenancy in common in an oil and gas leasehold may arise through a single lease to multiply lessees, an assignment of undivided interests by a single lessee, or leases by tenants in common to different lessees.[11] Thus, where cotenants in a tract of land execute leases to different lessees of the undivided interests of the respective cotenants in the entire tract, that transaction of itself constitutes these lessees cotenants in the leasehold, so that one lessee is entitled to share in the profits from production obtained on the tract by another lessee, even though the first lessee does not obtain production or attempt to do so.[12] And where the lessees enter into a joint operation agreement, the agreement does more than merely embody the law of cotenancy, and under it production by one lessee is production by the other for all purposes, and will satisfy the habendum clause in the lease of the other calling for continued production on the tract by the lessee in order to extend the lease beyond the primary term.[13] But it has been held that the ownership of a mineral estate in the whole of a voluntary subdivision and of a mineral lease in a portion thereof did not involve merger or make the owner-lessee a tenant in common with the remaining portion of the subdivision, or liable to the other lessee for any part of the oil and gas produced under a drilling permit.[14]

APPENDIX EXHIBIT 2.

Excerpts From Authorities With Respect to Elements of Estoppel.

State of Oklahoma v. State of Texas, 45 S. Ct. 497, 268 U.S. 52, 69 L. Ed. 937:

> "In this situation the asserted estoppel must fail. Only where conduct or statements are calculated to mislead a party, and are acted upon by him in good faith, to his prejudice, can he invoke them as a basis of such an estoppel."

31 C.J.S., Sec. 72, p. 442:

> "It is essential to an equitable estoppel that the person asserting the estoppel shall have done or omitted some act or changed his position in reliance upon the representations or conduct of the person sought to be estopped. A change of position which will fulfill this element of estoppel must be actual, substantial, and justified."

22 Tex. Jur. 2d, Sec. 16, p. 683:

> "Estoppel is always predicated on the conception that the pleader thereof has been misled to his prejudice by some statement, act, or conduct of another who seeks to assert a right inconsistent therewith. Thus, one material element of an estoppel is that the party claiming it must have been misled by the representations or conduct of the opposite party to change his position in such a manner that he will be injured if estoppel is not declared. No estoppel is predicable of acts or statements of the defendant where it is not shown that the conduct or position of the plaintiff has in

any respect been influenced thereby to his prejudice in some material aspect. The rule is fundamental that, unless the representation of the party to be estopped has been acted on by the other party in a way different from the way in which he otherwise would have acted, and to his prejudice, no estoppel arises."

Nance v. Currey, 257 S.W. 2d 847:

"Reliance and change of position are essential elements of estoppel. *Nelson v. Wilson,* Tex. Civ. App., 97 S.W. 2d 287; 17 Tex. Jur. 145."